THE STAR ROUTES.

[*Continued from First Page.*]

been lost by long disuse. I need not take up the time of Your Honor in reading from that case. That, it is true, had reference to a question of property, but if eighty years were sufficient to fix the tenure and the right of property, then 150 years ought to be sufficient to do something in the way of securing a man in his rights of liberty. But now, if Your Honor please, this old instrument of kingly power, this weapon of a king against the

RIGHTS OF A SUBJECT,

that has been buried out of the sight of men for more than a century and a half in this jurisdiction, which had long ceased to be even a memory, and whose existence even is only to be learned by the study of the history of long-gone times, is sought to be brought from its deep grave and used to strike down that shield both of the Government and of the citizen, the grand jury; and the attempt is made to use it again as a weapon of offense against the rights and liberties of the citizen. I know that Your Honor will not permit this unless driven to it by the stern requirements of the law, which it is your pleasure to obey and your duty, as its officer, to enforce. And you will be the more

RELUCTANT TO PERMIT THIS

when you consider that during the life of this nation, and during the century and a half of law as it existed in the State of Maryland, before this nation began, this institution, the grand jury, has been the recognized, and the only, recognized authority for the prosecution of parties for alleged crimes. Your Honor knows better than I can state them the purposes of the institution known as the grand jury. Those purposes were, and ever have been, most beneficent. They are twofold, the protection of society against wrongdoers by presenting them for trial, and the protection of citizens against trials on unfounded accusations.

Before this body accusations must be brought, evidence must be heard, and *only legal evidence can be heard*. Hearsay goes for nothing. The thousand lying tongues of rumor are paralyzed; public clamor is impotent; conscientious, impartial men, "good and lawful" men, selected from the body of the people, hear the witnesses, sift and weigh the testimony, examine and cross-examine, and *on their oaths* say whether there should or should not be a prosecution. That is the grand jury.

THE WIT OF MAN COULD NOT DEVISE

a scheme more in consonance at once with the rights of society and with the rights of the citizen. Speaking of it, a most learned judge said: "Into every quarter of the globe in which the Anglo-Saxon race have formed settlements they have carried with them this time-honored institution, ever regarding it with the deepest veneration and connecting its perpetuity with that of civil liberty;" and Mr. Justice Field, in a charge delivered to a grand jury in California, has spoken of it in these words, which

YOU WILL FIND REPORTED IN 2 SAWYER:

In this country, from the popular character of our institutions, there has seldom been any contest between the Government and the citizen which required the existence of the grand jury as a protection against oppressive action of the Government. Yet the institution was adopted in this country and is continued from considerations similar to those which give to it its chief value in England and is designed as a means not only of bringing to trial persons accused of public offenses upon just grounds, but also as a means of protecting the citizen against unfounded accusation, whether it comes from Government or be prompted by partisan *passion or private enmity*. No person shall be required, according to the fundamental law of the country, except in the cases mentioned, to answer for any of the higher crimes, unless this body, consisting of not less than sixteen nor more than twenty-three good and lawful men selected from the body of the district, shall declare, upon careful deliberation, under the solemnity of an oath, that there is good reason for his accusation and trial. From these observations, it will be seen, gentlemen, that there is a double duty cast upon you as grand jurors of this district: one a duty to the Government, *or more properly speaking*, to society, to see that parties against whom there is just ground to charge the commission of crime, shall be held to answer the charge, and on the other hand, a duty to the citizen to see that he is not subjected to prosecution upon accusations having no better foundation than *public clamor or private malice*.

BUT NOW YOUR HONOR IS ASKED

to allow the place of this shield of both society and the citizen, this institution of civil liberty, whose just methods have exclusively obtained in this jurisdiction for more than a century and a half to be usurped by that old, long-forgotten extraordinary and odious weapon of a crown—an information. I beg to repeat that this will not be done unless some inexorable *law* requires it. And permit me too add one further consideration on this branch of the subject. The Constitution has so limited the powers of Congress that certain crimes can only be presented by a grand jury—treasons and otherwise infamous crimes. Treasons are rare in this country. If an offense of the grade of this we are now considering is not infamous, then infamous crimes are exceedingly rare; so that if this proceeding can prevail, from this time forth the grand jury may practically be dispensed with; for if in this case the precedent is established, and by your decision you say that the District Attorney may ignore the grand jury and come forward with an information, then, as to that vast number of offenses which come to the attention of this court, the occupation of the grand jury will be gone. If you decide that the District Attorney has the right to do this in this case, how can you deny that right in any such case that may be presented? If you so decide you place it in his power to strike down the great protector of society and of the citizen. I repeat then that nothing but the rigorous demands of duty will ever

DRIVE THIS COURT TO SO DECIDE.

Now, I said in the beginning, if Your Honor please, that if this information can be filed it must be, not because any statute has authorized it, but because it is authorized by the common law, and I therefore proceed to consider that common law remedy, and to inquire whether these learned gentlemen have brought themselves within its requirements. If they resort to the common law they must abide by and *strictly* conform to its requirements. If they will "live by the sword they may perish by the sword." I beg Your Honor's indulgence therefore while I consider as briefly as circumstances will allow this common law proceeding by information. There were two classes of informations at common law. First, the attorney-general, who represented the Crown, might file an information in the Court of King's Bench at his own discretion and on his own responsibility. He did not ask the leave of the court. It was the King's own court and the attorney-general was the representative of the King. The court would not grant him leave if he asked it. He had the absolute power and upon him alone rested the responsibility. No oath was necessary to such an information. No witnesses need be examined. No evidence was required that there was any probable cause for the proceeding.

BLACKSTONE TELLS US THAT

"the usual objects of an *ex-officio* information are properly such enormous misdemeanors as peculiarly tend to disturb or endanger the Queen's government, or to molest or hurt her in the discharge of her royal functions, or materially to prejudice the public generally," and he gives as instances seditions, riots, libels upon the Crown, upon the judges, &c., a class of cases to which this one bears no resemblance whatever. But no matter about that for the purposes of my argument. Nobody now will pretend that such a proceeding as that can prevail in this country. The fourth article of amendment to the Constitution has made it impossible. That provision reads as follows:

The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures shall not be violated, and no warrant shall issue but upon probable cause supported by oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized.

Now, if Your Honor please, since that provision was adopted in our Constitution no attorney-general, no district attorney, no special assistant district attorney, no combination of lawyers, no anybody, can, on his or their own discretion and responsibility, present to this or any other court in this country an information. There must be accompanying it an oath or affirmation, and that oath or affirmation must be sufficient to show probable cause. What that expression "probable cause" means I will hereafter consider.

Thus you will see, may it please Your Honor, that there is one feature of the common law which has never had, and which, while our Constitution stands, can never have a foothold in the jurisprudence of this country.

THE OTHER CLASS OF COMMON LAW

criminal informations consists of those presented by the king's coroner, or master of the crown office. This was also an old remedy. It was a prosecution by the master of the crown office at the instance of some informer. It became so much the weapon of malice and oppression that in 1693 an act was passed, 4 and 5 of William and Mary. I ask your indulgence while I read the recital of it. The title of that act is this:

An act to prevent malicious informations in the Court of King's Bench, and for the more easy reversal of outlawries in the same court.

The act proceeds:

Whereas divers malicious and contentious persons have more of late than in times past procured to be exhibited and prosecuted informations in their Majesty's Courts of King's Bench, at Westminster, against persons in all the counties of England for trespasses, batteries, and other misdemeanors, and after the persons so informed against have appeared and pleaded to the issue the informers do very seldom proceed any further, whereby the persons so informed against are put to great charges in their defense, and although at the trial of such informations verdicts are given for them, or a *nolle prosequi* be entered against them, they have no remedy for obtaining costs against such informers, &c.

Providing that thereafter they shall be required to give a bond in the sum of twenty pounds in order to get a standing in court, so that somebody would have to answer in the event of a failure to convict.

THE ACT THEN PROCEEDS

to provide as follows:

That from and after the first day of Easter Term, in the year of our Lord 1693, the clerk of the crown in the said Court of King's Bench for the time being shall not, without express order to be given by the said court in open court, exhibit, receive, or file any information for any of the causes aforesaid, or issue out any process thereupon, before he shall have taken or shall have delivered to him a recognizance from the person or persons procuring such information to be exhibited, with the place of his, her, or their abode, title or profession, to be entered to the person or persons against whom such information or informations is or are to be exhibited in the penalty of twenty pounds, that he, she, or they will effectually prosecute such informations or information, and abide by and observe such orders as the said court shall direct.

THAT WAS THE STATUTE

[illegible] and 5 William and Mary, which was enacted [illegible] purpose indicated by the title of the act [illegible] the recital which I have just read. That [illegible]d been in existence in England for nearly [illegible]efore the formation of our Government. [illegible]ill observe that it prohibited informa[illegible]cept on the express order of the court. I [illegible] Your Honor to remember that. The act left it to the judgment of the court to determine what should be sufficient to induce a court to grant leave to file an information; and on that subject in the case of Rex vs. Jolitte, 4 Term Reports, 290, Lord Kenyon, chief justice, said:

Before the statute 4 and 5 W. and M., C. 18, it was in the power of any individual to file an information without disclosing to the court the grounds on which it was exhibited. But that practice being attended with the inconveniences recited in the preamble to that statute, it was enacted that no information should be filed without the express order of the court publicly given. That statute does not enumerate the grounds which are sufficient to enable us to grant the information, but the Legislature left it to our discretion, trusting that we should not so far transgress our duty as to go beyond the rules of *sound discretion*.

FOLLOWING THAT CAME

the case of Rex vs. Robinson, 1 Wm. Blackstone, 541, in which Lord Mansfield uses this language:

Lord Mansfield—Informations at common law (which are very ancient in this court) were filed by the coroner, who did it upon any application, as a matter of course. The statute was, therefore, made to limit it; and other grounds there are, by which the court has limited itself. First—As to the merits of the person applying, for they may be under such circumstances as that the court will not interpose to favor them. Second—The time of application. As to this there is no precise number of weeks, months, or years, but if delayed the delay must be reasonably accounted for. This consideration is more necessary in election contests than in others; there is ill-blood enough without this addition to it. Third—The suspicious state of the case, *ex evidentia rei*.

IN HIS WORK ON CRIMINAL INFORMATIONS

at page 14, Cole, speaking of informations that might be filed by the master of the crown office, says:

But although the court have the power to grant criminal informations for any misdemeanor whatever, they will not in the exercise of a sound discretion permit such informations to be filed except in serious cases, as for gross and notorious misdemeanors, riots, batteries, libels, and other immoralities of an atrocious kind, not peculiarly tending to disturb the government—for these are left to the care of the attorney-general—but which, on account of their magnitude or pernicious example, deserve the most public animadversion. (4 Blac. Com., c. 23, S. 3, 1 Chit. Crim. L., 850.) Moreover, the court always considers an application for a criminal information as a *summary extraordinary remedy, depending entirely on their discretion*, and therefore not only must the offense itself be of a serious nature, but the prosecutor must apply promptly or must satisfactorily account for any apparent delay. He must also come into court with clean hands and be free from blame with reference to the transaction complained of. He must prove his entire innocence of everything imputed to him, and must *produce to the court such legal evidence of the offense having been committed by the defendant as would warrant a grand jury in finding a true bill* against the defendant, otherwise he will be left to his ordinary remedy by action or indictment.

MOREOVER, THE COURT ALWAYS CONSIDERED

the application for a criminal information as a summary and extraordinary remedy, depending entirely on their discretion; therefore, not only must the event itself be of a serious nature, but the prosecutor must apply promptly; he must also account for any apparent delay. He must also come into court with clean hands, and be free from blame with reference to the transaction complained of. He must prove his entire innocence of everything imputed to him, and must produce—I ask Your Honor to mark this—must produce to the court such *legal evidence* of the offense having been committed by the defendant as would warrant a grand jury in finding a true bill against the defendant. Otherwise he will be left to his ordinary remedy by action or indictment.

IN THE CASE OF

The King vs. Willett, in 6 Term Reports, 294, the court refused to allow an information to be filed because the evidence offered was not legal evidence, and held that the court took the place of the grand jury, and could only grant an information on evidence that would support an indictment. I will read an extract from the opinion in that case. The court refused to grant the rule because the affidavit on which it was prayed for was not legal evidence. They said that in these cases they were placed *in the room of a grand jury*, and went on to say: "The affidavits or the oaths of these persons of what Hatherly had said"—(please remember that Hatherly had carried a challenge for which they were proceeding against him by a criminal information, or trying to)—" the information or the oaths of these persons would not be legal evidence against the defendant, and that this court could only grant an information on evidence that would

SUPPORT A BILL OF INDICTMENT."

In the case of the United States vs. Coolidge, in 2 Gallison, 363, an indictment had been found against a party, and there was a motion made to quash that indictment, because a party had been got before the grand jury in some way and his testimony had been taken without oath. This is an instructive case to those who argue this case in the newspapers. I saw it stated very gravely in a newspaper coming from New York, a few days ago. It was one of those paragraphs that was rasping up my friend, the District Attorney of this court; that there must be some great dereliction of duty in this court, because, in a certain other case, which I will not mention, somebody had been interfering

TO PREVENT THE GRAND JURY

from finding an indictment unless there was some evidence brought before the grand jury. Absolutely they have gotten to complaining of this court and of this jurisdiction and its officers because indictments are not found by a grand jury without testimony. Now, here is a case that, in view of that statement, might be instructive to these gentlemen. Judge Story—of course Judge Story in his day did not know half as much about law as the editor of a New York newspaper does nowadays; he could not know half as much; he lived a long time ago—but still here is what he said:

THE QUESTION WAS

whether a witness who had been taken before the grand jury, and upon whose testimony the indictment had been found without that witness being under oath, could be sustained. Judge Story said:

Lee's affidavit is direct and positive as to a fact of which he could not be ignorant. The counter affidavits are merely of impressions. The court must be governed by the rules of evidence, and the facts must therefore be taken to be stated by Lee. Of the law arising upon these facts there can be no doubt. The grand jury is the great inquest between the Government and the citizen. It is of the highest importance that this institution be preserved in its purity, and that no citizen be tried until he has been regularly accused by the proper tribunal. Every indictment is subject to the control of the court, and this indictment having been found irregularly and upon the mere *statement of a witness without oath*, which was not evidence, a *cassetur* must be entered.

Now if Your Honor please, there is a case. Judge Story may not have known much law,

BUT THAT WAS HIS OPINION

and in his day and generation was considered of some weight, and if Judge Story had been holding this court, and the grand jury had inquired of him in regard to a matter of this kind Judge Story would have told the grand jury, you cannot take anything but legal evidence, such evidence as may be used on a trial before a petit jury. I now ask attention to the case of the United States vs. Maxwell, 3 Dillon. You will hear a great deal of this case before we get through with this discussion. I am only going to allude to it now for one purpose.

THAT WAS A CASE WHERE A PARTY

was informed against for a violation of the revenue laws. I beg that Your Honor will bear this in mind when you come to hear my learned friends on the other side discuss this case and my associates reply to them; but I call Your Honor's attention to it at this point in the argument for the purpose of showing that the view I am contending for prevails wherever you find the subject mentioned at all. In this case, after discussing the question of what is and what is not an infamous crime, and whether or not proceedings can be had by *information*, Judge Dillon proceeds as follows:

We are of the opinion, therefore, that offenses not capital or infamous may, in the discretion of the Court, be prosecuted by information. We cannot recognize the right of the district attorney to proceed on his own motion, and shall require probable cause of guilt to appear by the oath of some creditable person before we will allow an information to be filed and a warrant of arrest to issue. But with these safeguards there is no more reason to fear an oppressive use of information than there is reason to fear an abuse of the powers of a grand jury. When the accusation is a *grave one*, or where the charge seems to be doubtful, the court will refuse leave to file an information and compel the district attorney to lay it before a grand jury. But it is well known that the internal revenue laws have created a large number of minor offenses, many of them involving no moral turpitude, and that the cost of proceeding by a grand jury and the delay are burdensome and inconvenient, both to the Government and the defendant.

NOW AS TO THE CASE OF SHEPHERD,

in 1 Abbott. If Your Honor will examine that case you will find that there the court held that where there was an application made to file a criminal information the proper practice would be for the party to be taken—first, on a complaint under oath before a committing magistrate, and then the district attorney might bring the commitment, the complaint, and the affidavit, before the court, and upon those, if they showed a proper case, the court could order the information to be filed. I mention these two cases in this connection because they show that wherever the court has dealt with that question it has always required the production of *legal evidence* of the fact that the party to be proceeded against had committed the offense charged. Mr. Chitty, in his work on criminal law, at page 318, uses this language:

With respect to the kind of evidence which a grand jury may receive it should be observed that they are bound to take the *best legal proof of which the case admits, and it must be given under oath*.

The written statement of a witness cannot be received in lieu of his parol testimony. Nobody can go before the grand jury of this or any other district and present some man's written statement to that grand jury, and ask them to find an indictment upon that statement.

No evidence of what third persons have said will not be good, nor support a bill before the grand inquest.

Now, if Your Honor please,

FROM THESE AUTHORITIES YOU PERCEIVE

What were the requirements of this common law by which our learned adversaries say we must be bound? First, the court stood in the place of the grand jury. Second, no information could be filed but by leave of the court. Third, the leave of the court would not be given without evidence sufficient to warrant a grand jury in finding an indictment. Fourth, that evidence *must be legal evidence*. Fifth, there must be no delay. Sixth, The accuser must come with clean hands. If any of these elements are lacking the court will refuse permission to file an information and the resort must be to the grand jury. And added to all this is the provision of our Constitution which I have read here, forbidding the arrest of any person except on oath or affirmation showing probable cause. This provision, if Your Honor please, cuts up by the roots, so far as our tribunals are concerned, any discretion that may have rested in the courts of England. There must be, says the Constitution, *probable cause* shown by oath or affirmation. It is absolutely imperative that there should be probable cause shown. I might just as well here as at any other point consider what is "probable cause."

PERMIT ME TO READ TO YOU

the definition as given by some of the courts, "Probable cause may be defined to be an apparent state of facts found to exist upon inquiry (that is, such inquiry as the given case renders convenient and proper), which would induce a reasonably intelligent and prudent man to believe in a criminal case—that the accused person had committed the crime charged, or in a civil case that a cause of action existed. (Lacy vs. Mitchell 23, Ind. 67. See also Hays vs. Blizzard, 30, Ind. 457.) I refer your honor to the case of Wanson vs. Wyckoff, 16 New York, (that is my friend Mr. Bliss' State.) It is a reasonable ground for suspicion, supported by circumstances sufficiently strong in themselves to warrant a cautious man in believing that the accused is guilty of an offense with which he is charged. It is understood to mean such probable cause as might induce a discreet and impartial man to suspect the party to be guilty. And see also Conkling's treatise, page 597. On this subject I desire again to call Your Honor's attention to the charge delivered to a grand jury in California by Mr. Justice Field, reported in 2 Sawyer.

IN THAT CHARGE JUSTICE FIELD SAYS:

In your investigations you will receive only legal evidence, to the exclusion of mere reports, suspicions, and hearsay evidence.

That is pretty plain language. He goes on to say:

Subject to this qualification, you may receive all the evidence presented which may throw light upon the matter under consideration, whether it tend to establish the innocence or the guilt of the accused and more. If, in course of your inquiries, you have reason to believe that there is other evidence not presented to you within your reach, which would qualify or explain away the charge under investigation, it will be your duty to order such evidence to be produced.

A VERY IMPORTANT POINT,

as I will show your honor hereafter. The Judge proceeds, "formerly it was held"—and this is the particular point to which I ask Your Honor's attention—"formerly it was held that an indictment might be found if evidence were produced sufficient to render the truth of the charge probable; but a different and more just and merciful rule now prevails. To justify the finding of an indictment, you must be convinced, so far as the evidence before you goes, that the accused is guilty. In other words, you ought not to find an indictment unless, in your judgment, the evidence before you, unexplained and uncontradicted, would warrant a conviction by a petit jury." There is the best definition of probable cause that has ever found its way into the law books, and it comes from a source that is worthy of the very highest credit.

In 1st Wharton, Criminal Law, section 493,

THE RULE IS LAID DOWN

that no testimony is competent before the grand jury that is not competent before the trial jury, and in section 494, he says that the grand jury, when in doubt as to the legality of evidence, may ask the court.

Now, Your Honor, I desire to apply this law to the case in hand. You will not forget that you are to—I will not say usurp the functions of a grand jury, but you are to sit in its stead, and these gentlemen ask you to permit them to file this paper, and to cause warrants to issue for

THE ARREST OF MY CLIENTS.

You say to them: "Well, gentlemen, the common law, upon which you propose to proceed, says that I must have evidence of the offense having been committed—legal evidence, not hearsay—evidence enough to warrant an indictment;" and Your Honor further says to them: "The Constitution provides that I cannot issue this order of arrest for which you ask; that I cannot permit this information to be filed until you do come before me with legal evidence sufficient to warrant the finding of an indictment by a grand jury. Now show me your evidence, gentlemen of the prosecution." That is what Your Honor must say to these gentlemen. You ask them: "Where are your proofs?" Now let me read to Your Honor the proof which they do offer in this case, and I will read every word of it.

City and County of Washington, D. C., ss:

Before me, A. C. Richards, a justice of the peace in and for the aforesaid District and county, personally appeared Thomas L. James, who, being duly sworn, says that he is Postmaster-General of the United States, and, as such, the head of the Post-Office Department of the United States, and has been such since the 7th day of March, A. D. 1881; that he has read the foregoing information and knows the contents thereof; that the same is true, as he states, *upon information and belief*; that his knowledge, information, and belief is derived from an examination of the records of said Department, including the orders and papers relating to the various matters set forth in said information, including the increase of service and of expedition, the reductions of service, the offer to sureties, and the change of route, the position and action of Brady, French, and Turner, and also from the reports and statements made to him by the inspectors, and other agents and officers of the Post-Office Department, who have, by deponent's direction been engaged for many months in a careful and minute examination and investigation of the transactions of the Post-Office Department, its officers, and agents, so far as they relate to contracts for carrying the mails and the mail service during the period from the beginning of the year 1877 to the month of March in the year 1881.

[Signed] THOMAS L. JAMES.

Subscribed and sworn to before me this 29th day of September, 1881.

A. C. RICHARDS, J. P.

{SEAL}

City and County of Washington, D. C., ss:

Before me, A. C. Richards, a justice of the peace in and for said District and county, personally appeared P. Henry Woodward, who, being duly sworn, says that he is an inspector of the Post-Office Department, and has been such inspector since the 14th day of March, A. D. 1881; that as such inspector he has, under the direction of the Postmaster-General, charge of an extended and minute investigation into the management of the mail service of the United States since the year 1877; that he has read the foregoing information, and that the facts therein stated are true, as deponent states after such examination; that he has examined the several contracts, orders, and papers therein referred to, and their contents are correctly stated; that he has procured the statements of various persons who were concerned in or connected with the transactions set out in said information, and that his information and belief as to the truth of the statements contained in said information is derived from said examination of said papers and from said statements.

(Signed) P. H. WOODWARD.

Subscribed and sworn to before me this 29th day of September, 1881. A. C. RICHARDS, J. P. [SEAL.]

There it is, Your Honor, every word of it, from beginning to end. They have not sworn to a thing—not a thing, not a fact has either of these gentlemen sworn to. It is the most admirable performance of the kind I have ever seen. I can well imagine that when Mr. Thomas L. James and Mr. P. Henry Woodward came up to swear in this case they may have been looking suspiciously over their shoulders, and I can imagine one of these learned gentlemen upon the other side saying to them: "What is the matter?" and their replying: "We are just looking around to see if there is any penitentiary in this vicinity;" and then I can imagine these learned gentlemen saying to them confidently, "Why, no; there is not one within a thousand miles of you." "Why not?" "Why, because you are not swearing to anything. There is not anybody on earth who can criticize anything that you are saying in that paper; you have not sworn to a fact, and we do not ask you to swear to a fact." And they

HAVE NOT SWORN TO A FACT.

From the beginning to the end of this whole matter this which I have read is all the *proof* that these gentlemen offer. It is all hearsay—every word of it—except possibly the *belief* of these two deponents; but I have never heard of anybody being indicted upon somebody else's belief. That would not do in a criminal proceeding or in a judicial proceeding, because, unfortunately, there are many men in this world who are very swift to believe a lie. No, Your Honor, no; that would not do. But Mr. James has given us the *source* of his belief. Your Honor will remember that more than two hundred years ago the English courts said: "We will not listen to hearsay." You will remember that more than two hundred years ago the English courts said: "We will not accept copies of papers; we must have originals; we will not take secondary evidence; we must have the best evidence." Now, Mr. James in this case has given us the sources of his belief—for remember he only swears to his belief. He says he has examined some records. Well, Your Honor, is he to be the judge of what those records prove, or are you? Is Mr. James to be this grand inquest of one, whose judgment is to be satisfied, or are you?

ARE YOU TO PERMIT HIM

to make up a judgment for you which is to guide you in the exercise of this high duty? No, sir. You are the grand inquest, and these documents and these records are themselves the best evidence of what they contain, and they must be brought before you for your examination. That is the requirement of the law. We deny that those records contain that which will satisfy Your Honor that there has been a conspiracy, as is here charged, or any indication of a conspiracy. We assert that they will show that everything that was done in this business was done in strict conformity with law and regulations adopted long before these gentlemen had anything to do with the affairs of the Post-Office Department. We have invited the Postmaster-General to allow us to examine these records, and he refused. We have asserted on oath in the record in this case that these records and files of the Department exist, and have stated what would appear by them, and the prosecution persistently withholds them from Your Honor. Therefore, I say, by every legal intendment we have the right to claim, in Your Honor's presence to-day, that what we say of them is true. But no matter for that. These records have not been shown to Your Honor. You do not know what they contain, and until you do know they cannot affect us, nor can you infer that there is anything in them that will weigh even so much as the weight of the lightest feather that falls from a linnet's wing against my clients. These gentlemen have brought you

MR JAMES' STATEMENT

that he has read these documents and records, and that is all they have brought you; that is all there is of this proof. Is that legal evidence? Is that evidence fit to go before a grand jury? Would you allow it to go before a trial jury? That is a good test. Sitting in your place here and with that jury in the box, would you allow Mr. Thomas L. James to stand up here as a witness and say to the jury, "I have read certain documents in my office and they show so and so, and prove that these men are guilty of this offense?" No, Your Honor, you would not do anything of the kind. It may be good enough evidence as the world goes to base a newspaper indictment upon, of which we have had many examples in these late days; it may do for a political convention; it may do to make cheap reputation upon, but it would not be good even in a Tombs court. Judge Snell would not allow it for a moment on the trial of the most miserable culprit that comes before him. But Mr. James gives you another source of his belief. He says that people have told him so and so. Well, is that evidence fit for this grand inquest? Is not that hearsay? Who were these persons that told Mr. James and so? Are they detectives or blackmailers, or are they good and honest men? I do not know, do you? Were they making their statements under oath, or were they drunk, or were they sober, or were they sane,

OR WERE THEY CRANKS?

I do not know, do you? No, sir. But what did these men tell Mr. James? I do not know. Who does? He does not even state what they told him, but if he had stated it you would not permit it to go to a grand jury if the grand jury would ask you the question, or to a petit jury if it were attempted to be offered as evidence on a trial before Your Honor. Certainly not. Your Honor does not know anything about any of these things, nor do I; but I know, and Your Honor knows, that this hearsay is not competent evidence, and that these parties who have told Mr. James these things, whoever they may be—I do not know who they are—should have been brought here under oath, and their stories should have been told by themselves to this Court, either orally or upon affidavit, so that there would be some responsibility resting somewhere if it should be found that this was an attempt to get up an unjust prosecution against my clients. Read these affidavits, Your Honor, and then let me ask you to state, in your opinion in this case what there is in them that is not the baldest hearsay: what there is that would lead any reasonable man even to suspect guilt.

TEST THIS EVIDENCE

by the charge that I have read to Your Honor, which was delivered by Mr. Justice Field to that grand jury; test them by all the authorities that can be found from the earliest history of the English government down to this hour, or at least from this act of William and Mary, down to this time; test them by all the authorities, and I undertake to say you will find nothing that would warrant either a grand jury in finding an indictment, or yourself sitting as a grand inquest of one, in permitting an information or allowing an information against the accused. Now, if Your Honor please, I want to test this thing in another way. Let me suppose that the accused had been brought before Your Honor as a committing magistrate, where you could only hold to bail, and where the writ of habeas corpus would be open to the accused if you unjustly held to bail, and suppose that Mr. Thomas L. James had, on this preliminary hearing, sworn that he had examined the records in his office, and that he had had conversations on the subject of the charge with divers persons, and that they had told him thus and so;

OR SUPPOSE THAT MR. P. HENRY WOODWARD

should come and swear to exactly the same thing, would Your Honor commit? Would you hold to bail? No, sir; it cannot be possible that you would. And if any examining magistrate should do so, and on a habeas corpus proceeding before Your Honor, no more proof than that were adduced, you would not hesitate to discharge the accused. How much more then should you not permit an information to be filed and warrant to issue on it when that cuts off the remedy by habeas corpus; for when a party is once indicted or informed against his only relief is by a final trial. Tested by the principles of the common law, in connection with the provision of the Constitution I have quoted, this information cannot be filed. It is not supported by the oath of anybody to any fact whatever. Before leaving this branch of the case I want to call Your Honor's attention to some authorities. First, I ask attention to a case in 21st Illinois, page 84, Dyer vs. Flint. In that case it was held that an affidavit in an attachment which sets forth indebtedness on information and belief is not sufficient, nor that the party is about to depart on information and belief. Then there is the case of Archer vs. Claflin, 31 Illinois, 306.

I NOW CALL ATTENTION

to the case of Coleman, reported in 15 Blatchford. On the 3d day of November, 1878, Stephen Mansher made oath before John I. Davenport, a United States Commissioner, to an affidavit, stating that "there is to be an election held in the city of New York, on the 5th day of November, 1878, at which Representatives in Congress are to be chosen; that there has, in accordance with the laws of the State of New York, been a registration of voters for said election; that said registration was on the 8th, 16th, 25th and 26th days of October, 1878; that as deponent is informed and believes one Peter Coleman did, on one of the said days of registration, for the purpose of registering himself as a voter or otherwise, unlawfully use a certain certificate of citizenship of the Superior Court in the city of New York, showing him to be a citizen, knowing that such certificate had been unlawfully issued, or made." The man who drew this affidavit was not so prolific in adjectives and adverbs as were the learned gentlemen who drew the remarkable paper which your Honor is now considering; but the affiant in this case had alleged that

THIS THING WAS UNLAWFULLY DONE,

and that he knew it was unlawfully done. I ask Your Honor's attention here to the statute under which this proceeding was had. By reading it Your Honor will observe that this affidavit, made by Mosher, was drawn expressly to fit this statute, and that they put into the affidavit all the "unlawfullys" and the "knowing," and all that, just to make it conform to the provisions of the statute. Coleman was arrested. He took out a writ of habeas corpus. Now, will Your Honor please to compare that affidavit in the case of Coleman with the two affidavits which these gentlemen present to Your Honor in this case? In the Coleman case Mosher swore that this thing was unlawful, and he swore that Coleman knew it was unlawful, and that Coleman used the certificate for an unlawful purpose.

Mr. Shellarbarger—And he swore that the certificate itself was unlawfully issued.

Mr. Wilson—Yes; he swore that it was unlawfully issued, but still the court said to the commissioner, or whoever was engaged in the case, in substance this: "Adjectives are not what is required. The law does not commit men and send them to the penitentiary on adverbs." Our friends who drew this paper here are certainly the champion go-as-you-please adverb and adjective slingers of the world. I never saw so many such parts of speech in one paper in my life. But in this Coleman case the court says that that kind of thing will not do; but that you must set out in your affidavit the evidence which shows the unlawfulness of the act charged. The court says

"WE MUST HAVE THE FACTS

in the case—the evidence in the case—we won't accept anything else. We cannot go upon mere hearsay; we cannot allow this witness to be the judge as to the sufficiency of the proof, and, therefore, in that case, the court held that there was no probable cause shown in that affidavit, just as we contend there is no probable cause set forth in these affidavits.

At this point the court took a recess.

After the Recess.

After recess Mr. Wilson continued his argument as follows:

If Your Honor please, In addition to what I have been urging in regard to the sufficiency of these affidavits, the common law says that the proceedings must be prompt, and there must be no delay. If there is delay some good excuse must be offerred for it. According to one of the counts in this paper the conspiracy was formed in 1877—October, 1877. An overt act is laid as far back as October 1, 1878, and some overt acts are laid prior to October 1, 1878; and it is public history, may it please Your Honor, that as much as two years ago Congress most elaborately investigated this identical matter, and appropriated money to carry out this very contract which these gentlemen say was so very corrupt. The facts have been notorious for more than two years. Now what excuse do they give for coming here after this long delay and asking Your Honor to allow them to file an information for so grave a charge as this? You will remember that in the 3rd of Dillon, the Maxwell case, the court said that it would not allow an information to be filed where the case was grave or where it was doubtful. It would not allow it to be done, but sent it to the grand jury. Now what excuse do they give for coming here after this long delay before their coming? None whatever. The facts have been open and notorious for more than two years. Men have made affidavits and published them in newspapers years ago—and repeated them many months ago; and all these records have not only been there in the Department, but they have been before the Congress of the United States and subjected to the scrutiny of a committee.

WHAT EXCUSE DO THEY BRING?

None whatever. True, they ask you to allow them to file it because three years have about elapsed, which they say would work a bar—the bar of the statute of limitations. But that is no excuse. It was their fault that this time had passed, not ours. They cannot take advantage of their own wrong. And besides this, as Your Honor knows, as long ago as last June, right here in this court, we asked the court to instruct the grand jury to take up these cases and pass upon them. We asked for action, but the gentleman refused to act. We demanded that there should be an end of clamor, and that the gentlemen should proceed in such way as that we might meet these accusations; but these learned gentlemen resisted, and finally, on the 29th day of September, made their appearance here with this information. They thus avoided the grand jury. Now, why? If they had gone before the grand jury these documents and records which Mr. James speaks of would have had to have been produced.

MR. JAMES' SAY SO

as to their contents would not have been accepted, nor would Mr. James' statement of what somebody told him have been taken. That somebody would have had to appear in person. The grand jury would have examined and cross-examined. They would have looked into the eyes of these witnesses. They would possibly have learned something as to their characters and credibility. If the records of this court showed that any of them had been indicted for a grave offense, or by common fame false and wholly disreputable, that grand jury might have found it out and weighed it as they would have had the right to do. All this might be avoided, Your Honor will see, by keeping away from the grand jury; and it was necessary that they should keep away from the grand jury. For, may it please Your Honor, it was necessary to suppress the truth in regard to this matter in order to get a standing in court. Now this may appear harsh, but

I AM WITHIN THE RECORD,

and I do not propose to go beyond the record in this case. The common law says that the truth shall not be suppressed, and we are invited to stand by the common law. I read a little paragraph from the case of Rex vs. Wroughton (3 Burr, p. 1683). It was a rule to show cause why an information should not be filed, just such a case as we have now before the court. Lord Mansfield said he "would not allow the information to be filed because the truth had been suppressed, and thereby the case had been misrepresented." Now, that is just what has been done in this case. There has been gross misrepresentation and a gross suppression of the truth. May it please Your Honor, we are showing cause—we have shown cause—and in doing so we say that while these prosecutors have said that by the regulations of the Department certain duties were imposed upon the Second Assistant Postmaster-General, we show to you that the regulations which they set out in this information, and upon which they rely, never was made until July, 1879, long after the matters averred against these defendants had occurred. And we have shown that by the regulations in force when they occurred, that they had existed

LONG BEFORE GENERAL BRADY

had any official relations with the Post-Office Department. The very matters in which complaint is made were expressly confided to the Postmaster-General, and were in no way in the direction of the Second Assistant Postmaster-General. This most important fact was suppressed. The grand jury would have learned these facts. Again, we have shown that it appears by the records that the increases and expeditions complained of were petitioned for and urged by the officers of the Government of the United States residing in the Territories of Arizona and New Mexico, by officials of those Territories, and by prominent citizens of those Territories in great numbers, as necessary to the welfare of the citizens of those localities. This most important fact, as bearing upon the motives of the accused, was suppressed.

AGAIN, WE HAVE SHOWN

that Walsh had been reported to the Department as having failed to perform the service as required by his contract, and that General Brady, because of this had suspended his pay for the quarter ending the 31st of March, 1881, in order to save the Government from paying for services that had not been rendered; and we have shown that by reason of this failure fines and deductions were made amounting to over $9,000.

Mr. Bliss—May it please the court—my friend will excuse me—but we desire not to be estopped if we do not here take an objection which we suppose to be well founded. As a matter of law we understand that if there be anything in the nature of a demurrer to this information, in form or fact, they must demur upon the record and admit those facts. We do not desire to stop the gentleman, but simply make the suggestion so that we may not be considered as having waived the point.

Mr. Wilson—I wish it distinctly understood, so far as I am concerned, that my friends here need not waive anything.

The Court—No; that is understood.

Mr. Wilson—But it is not in the nature of a demurrer. It is a great deal more than that. It is a question entirely above, and beyond, and back of, and surrounding all that. It is a question whether these gentlemen have come here in such a way as that they are entitled to the consideration of this court and shall be permitted to file this paper. We are showing cause why they should not be allowed to file it. My friend from New York stands here and asks Your Honor to allow him to file this paper, and I am here asking that Your Honor do not allow him to file that paper; and why? Because the truth is not told in that paper, for one of the reasons. That is the attitude. We are not demurring to his paper. We are not pleading to his paper. We are showing the iniquity of his paper under the rule to show cause. Now, what have we shown? As I said, we have shown that Walsh had been reported as having failed to comply with his contract.

WE HAVE SHOWN THAT BRADY,

in the quarter ending 31st of March, 1881, because Walsh had not performed his contract, because he had been so reported to the Department by the proper officer to report him, had suspended his pay for that quarter. We have shown that, by reason of the suspension, those reports and that failure upon his part to comply with his contract, there had been fines and deductions made against Walsh of over $9,000 in that quarter. We have shown, may it please Your Honor, that the very administration which makes this complaint, and which has characterized this contract with Walsh as a fraud—the result of a conspiracy—has not only remitted those fines and reductions, but has paid to Walsh the full contract price, nearly $25,000 of the money of the Government, just as though he had faithfully and in strict accordance with the contract performed the service the payment for which General Brady had suspended—

PAID FOR A CONTRACT

which they swear they believe to be fraudulent and the result of a conspiracy to defraud the Government. That was done the 1st day of July, 1881, before this information was filed, and these gentlemen who are urging forward this prosecution knew that fact, as I will show you in a moment. Now, if Your Honor please, suppose that these gentlemen had not dodged the grand jury—had not run away from the established precedents and practices of this court, and they had gone into the grand jury room, and Mr. Thomas L. James had gone in there and sworn that he believed this thing to be a fraud. I can imagine that the grand jury, in the discharge of its duty faithfully as good and lawful men should do, would have questioned him—would have said to him: "Mr. James, you say this is a fraudulent contract?" "Yes." "And Brady is a great rascal?" "Yes." "What has been done under your administration in regard to the performance of this contract?" "Oh! well, Walsh did not perform his service—all the reports show that—but we concluded to remit the $9,000 of fines that had been imposed and pay him the contract price."

NOW, WHAT DO YOU SUPPOSE

the grand jury would say to Mr. James after he had made such a statement? How much weight would his testimony have with them, although he is the Postmaster-General, under those circumstances? They would have sent him out of the grand jury room hanging his diminished head. And suppose Mr. P. Henry Woodward comes in there to them and they say to him: "Who are you?" "Well, I am a post-office official." "What is your position?" "Well, I examine chiefly into star-route frauds." "Mr. P. Henry Woodward, you say this is a fraudulent contract—a corrupt contract?" "Yes." "What do you know about Walsh having been paid under your jurisdiction on account of that contract?" Mr. P. Henry Woodward would be compelled to swear before the grand jury that he asked the Postmaster-General to do this very thing about which I have been talking. I say this, if Your Honor please, upon the record in this case. I am talking within the record. Now, what would an honest grand jury say to Mr. P. Henry Woodward?

WOULD THERE BE ANY CHANCE

for an indictment? No, and hence they must give the grand jury a wide berth and slip into this court upon affidavits in which they do not swear to anything. Well, suppose another man comes up. Mr. Gibson is sent for. I am talking inside the record, Your Honor. I mention no names other than those mentioned in the record. Mr. Gibson comes up and the grand jury say to him, "You say this is a corrupt contract?" "Oh, yes; I have been working on this thing for a great many years. I commenced on it before Congress began investigating, and I think I know all about it. It is a corrupt contract." "What is your position, Mr. Gibson?" "Oh, I represent the Department of Justice in this business." "What do you know about any payments made on this contract?" "Oh, yes; Mr. Woodward and I recommended the Postmaster-General to pay this to Walsh, and he has paid it." "Well, what was your purpose in this, Mr. Gibson?" I cannot imagine what his answer would be. Perhaps Your Honor can. It may be that it was for the purpose of getting a statement from Walsh. I do not know. It may be that by this means some of the statements that are referred to in this affidavit were procured. I don't know. I only know what is stated on the record in this case, and this I have a right to present to Your Honor. I do know that this most important and most damning fact is suppressed in this case, and we have shown that this particular thing was done by the recommendation of P. Henry Woodward, who made one of the affidavits in support of the information, and his known assistant, a representative of the Department of Justice, Mr. Gibson. May it please Your Honor, it is not for me to indulge in surmises. I am not going to

DEAL IN CONJECTURE.

We find these suppressed facts. We find it alleged that the contract with Walsh was corrupt. We find Walsh's name figuring largely in this paper which I hold in my hand, and yet he is not made a defendant. You, as the grand jury of one, may draw your own conclusions as to why he was not. But I do find in this paper that in making this charge they say in the first count that the 1st day of October, 1878, Brady, French, Turner, McDonough, Brown, and certain other persons to the "attorney aforesaid unknown." A certain person who is unknown is a little incomprehensible to me, but I suppose that Walsh must be the person. I only know that Mr. Walsh is the man who figures the largest in any allegations of fraud or fraudulent contracts, and Walsh does not appear in this information as a defendant.

AND WE HAVE SHOWN

that the *calculation* by which the pay for increased expedition was fixed, of which complaint is made, was made according to the rules of the Department, and the interpretation of the law which prevailed long before General Brady was connected with the Department. This fact was also suppressed. These gentlemen say that we must stand by the common law. It says you must have clean hands. We have called upon them to wash their hands, not with invisible soap in imperceptible water, but a good, manly wash. We want no hypocrisy—no broadening of phylacteries—we want the plain, unvarnished truth. They withheld it; we have placed it upon the record in this case. Now, may it please Your Honor, do you not see why they avoided the grand jury? If these facts had come to the grand jury—and no honest grand jury could have avoided discovering them—do you not see that an indictment would not be possible? And now they expect you, standing in the place of the grand jury, to ignore them.

WE LAY THEM BEFORE YOU

so that you may see, not merely the informity, but the iniquity of this proceeding. Give this prosecution the common law. It has suppressed the truth. Its hands are unclean, and by the principles of common law it can have no standing in this tribunal of justice. But, may it please Your Honor, that is another reason why our motion should be sustained. According to the averments of this information certain *discretionary* powers were by law and regulation conferred upon the Second Assistant Postmaster-General. It is not true in fact or law; but assume that it is.

YOU, AS THE JUDICIARY,

one of the co-ordinate departments of the Government are asked to sit in judgment upon the exercise of the powers and discretions of the Executive Department of the Government. I will not go into a detailed examination of the allegations of this information, but I invite you to scrutinize it, and you will find that before there could by any possibility be a conviction you must sit in judgment upon acts done under executive discretion. This is an important and indispensable element of the case, and if it should ever be tried one of the very first questions you would encounter is this: Can the Judiciary inquire into the action of the Executive Department in the matter of the exercise of executive functions which the law has confided to the discretion of executive officers. In the nature of things this cannot be done. To attempt it would be subversion of the principles of the Government. It would destroy the independence of the executive branch and subordinate it to a co-ordinate branch—the judiciary. It would subject every executive officer to judicial inquisition for his every act, from the President down. It would introduce conflict between branches of the Government that are wholly independent of each other. May it please Your Honor,

THIS CANNOT BE.

If there is to be any inquiry into such matters, it is not here, but in another tribunal, provided expressly by the Constitution—a high court of impeachment. On this subject I invite your attention to some authorities. (Wooddeson's Law Lectures, page 499; side page 355.)

It is certain that magistrates and officers entrusted with the administration of public affairs may abuse their delegated powers to the injury or ruin of the community, and at the same time in offenses not probably cognizable before the ordinary tribunals. The influence of such delinquents, and the nature of such offenses may not unsuitably engage the authority of the highest court and the wisdom of the sagest assembly. The commons, therefore, as the grand inquest of the Nation, become suitors for penal justice, and they cannot consistently, either with their own dignity, or with safety to the accused, sue to any other court but that of those who share with them in the Legislature.

In Yates vs. Lansing, 5 Johns, 291, Chancellor Kent, in making an elaborate review of the English cases, uses these words:

The doctrine which holds a judge exempt from a civil suit or indictment for any act done or omitted to be done by him sitting as a judge had a deep root in the common law. It is to be found in the earliest judicial records, and it has been steadily maintained by an undisturbed current of decisions in the English courts, amidst every change of policy and through every revolution of their government. * * *

Sergeant Hawkins (b 1 c 7 p 6) lays down this general rule as the result of his inquiries on the subject, "That the law has freed the judges of all courts of record from all prosecutions whatsoever except in the Parliament for anything done by them openly in such courts," &c.

The same rule was laid down by Chief-Justice Shaw in Pratt vs. Gardner, 2 Cushing, 63. In 73 N. Y. Reports. (Sanger vs. Benedict, p. 25.)

The general rule which applies to all such cases, and which is to be observed in this, has been in olden times stated thus: Such as are by law made judges of another, shall not be criminally accused or made liable to an action for what they do as judges; to which the year books (43 Edw., 3, 9; 9 Id., 4, 3) are cited in Floyd vs. Baker (12 Coke, 26). The converse statement of it is also ancient. Where there is no jurisdiction at all there is no judge; the proceeding is as nothing (Perkin vs. Proctor, 2 Wilson, 382-384) citing the Marshalsea case (10 Coke, 65-76), which says: "Where he has no jurisdiction, *non est judex*." It has been stated thus, also: No action will lie against a judge acting in a judicial capacity for any errors which he may commit in a matter within his jurisdiction (Gwynne vs. Poole, Lutw. 290). It has been in modern days carried somewhat further, in the terms of the statement: Judges of superior or general jurisdiction are not liable to civil actions for their judicial acts, even when such acts are in excess of their jurisdiction, and are alleged to have been done maliciously and corruptly (Bradley vs. Fisher, 13 Wall. 351).

On page 33 (73 N. Y.) the court, after saying that acts of a judge in determining whether a case is within his jurisdiction (the subject-matter being so and the jurisdiction depending on facts and principles of law upon which the judge must pass in deciding on jurisdiction) uses these words:

For such an act a person acting as judge therein is not liable to civil or *criminal* action. The power to decide protects, though the decision be erroneous. (See Garnett vs. Farrand, 6 B. and C., 2.)

NOW, WHERE IS THE DIFFERENCE

between a judge sitting on the bench to decide a case and an executive officer who is charged with quasi judicial functions sitting in his place to decide upon questions which the law confides to his judgment and discretion? Where is the difference in principle? Of course there cannot be one. Everybody will recognize—authorities are too well settled—that the judge of a court cannot be accountable, either civilly or criminally, for what he does upon the bench. If he does anything worthy of animadversion there is another mode by which he may be tried. It is the higher court of impeachment. That is so thoroughly settled now, so far as the judges of the courts are concerned, that nobody, I presume, will be found to controvert it. Upon principle it is exactly the same as with any other officer of the Government who is charged with the duty of discharging any kind of functions under the law. If the law has called upon him to decide, the law which requires him to decide, protects him in that decision. I am not left, fortunately, to my poor weak logic in regard to a matter of such importance as this. The same doctrine is strongly stated in Cunningham vs. Bucklin, 8 Cow., 178, by Chief-Justice Savage.

I CONCLUDE THIS REFERENCE

to authorities by his quotations from the latest American text-writers, which apply the doctrine as to the courts to executive and legislative officers. (2 Wharton C. L., 8th Ed., section 1571.)

To subject the superior officers of government, upon whose uninterrupted presence at the helm the safety of the state depends, to indictments for misconduct in office, would be injurious to the body politic; and consequently in such cases impeachment is the sole instrument of penal revision. This principle applies to the executive officers of government, so far as such officers are clothed with discretion; to the legislature, and clearly to the judges of all courts of record so far as concerns their judicial as distinguished from their ministerial acts.

Why, if Your Honor please, by the very terms of every count in this indictment these gentlemen have said that the discretion rested with General Brady to make these expeditions and this increase of service. They put their case upon that ground. They say that the law and the regulation gave him the authority to do this, but they say he did it corruptly. Now, this matter of increasing and expediting, according to their own statement of this case, was a matter that, under the law and regulations, was placed upon his judgment and discretion. Now, this authority says that that executive officer, who has this responsibility thrown upon him under the law, where the law makes it his duty to exercise that discretion, the law is his protector against any criminal accusation or prosecution on account of it, except by impeachment.

THE PRINCIPLE APPLIES

to executive officers of the Government so far as such officers are clothed with such discretion. Why, Your Honor, if a case like this can be maintained in this court then these gentlemen may come in here if they please and arraign upon information the members of the legislative branch of this Government for acts and votes of theirs in the discharge of their duties in passing this very appropriation these gentlemen are talking about here. They can arraign every member and Senator that voted for that bill if this principle can be maintained. It cannot be maintained.

THIS GOVERNMENT WAS CONSTRUCTED

with its three co-ordinate branches, each the equal of and independent of the other, and your Honor has no more right to try an executive officer or a Senator or a member of the House of Representatives for acts done by them in the discharge of their official duties than you have to try the chief justice of this District Court. The principle must be the same. In Bishop, on Crim. Law, 6th Ed., sec. 462, you will find this language:

"It is sufficiently settled that legislators, the judges of our highest courts and of all courts of record acting judicially, jurors, and probably such of the high officers of each of the governments as are entrusted with responsible discretionary duties, are not liable to an ordinary criminal process, like an indictment, for official doings, however corrupt. There is some apparent authority for including with them justices of the peace, in respect of things judicial, and within their jurisdiction; but the plain weight of authority, probably of reason also, excludes them; holding them liable to the ordinary criminal processes, though not to the civil, as we have seen in cases of corruption, not of mere mistake or error."

There is no doubt about it, except justices of the peace. That is the way Mr. Bishop puts it.

In note 4 to section 463 he says:

In our system of government, where the executive, legislative, and judicial functions are distinct, there seems to be no good reason why an executive officer should be required to answer in the judicial tribunals for a departure from duty or any other principles than would prevail if he were a judicial officer sued or indicted in respect of alleged error or corruption in that office.

Here we have it. We have the English authorities as to the place where you should proceed against judicial or executive officers. You have the authorities of this country in reference to the question of the liability of judicial officers to criminal proceedings or acts done in the discharge of their official duties. Now I have brought your attention to two of the leading authorities on this subject in this country. I think they show

IT CANNOT BE DONE;

and I say upon principle it cannot be done. I say any attempt to do it would be absolutely subversive of the very principle upon which this Government is founded. I say it is preposterous to say that some man, through his malice, or through public clamor, or what not, may come and file an information in this court against the President of the United States and charge him with corruption in the discharge of his official duties devolving upon him under his high executive office. If you can do this you can do that. If you allow this, and some man comes and offers you that, you cannot deny it. The President is no better, so far as his responsibility to the law is concerned, than myself or any other of the humble citizens of this country. If you lay down the rule once you have taken a start which is the entering wedge to confusion, disorganization, and all the evils which will naturally flow out of anything of that kind. Now, may it please Your Honor, passing from that, there is another proposition which it seems to me cannot be successfully controverted, which is

OPPOSED TO THIS PROCEEDING.

Let me state it. It is that, in order to constitute an offense under section 5440, the fraud conspired to be committed must be such an one as has been defined by statute and made a crime. Or, in other words, the conspiracy must be to do that which if done would be a crime by statute. I will read you this section. It has been repealed, but we do not care anything about that. My friend here will show you after a while that this statute was repealed in 1879; but this is the one upon which they are proceeding:

If two or more persons conspire either to commit any offense against the United States or to defraud the United States in any manner, or for any purpose, and one or more of such parties shall do any act to affect the object of the conspiracy, all the parties to such conspiracy shall be liable, &c., &c.

It is upon that they are proceeding. Now, I say, you will notice how general that language is: "That if two or more persons shall conspire to defraud the United States in any manner they shall be deemed guilty of an offense. Now, I say that the thing they must conspire to do must be that which if done by any one of them would be an offense denounced by some statute of the United States. That is my proposition. Let us see if I can maintain it. In other words the conspiracy must be to do that which, if done by any one, would be a crime defined by statute.

THERE CAN BE NO CRIME

unless the statute pronounces it a crime. If you say that the court may determine what is a fraud, that if a party conspires to do an act the court will determine that that thing is a fraud, it is the judiciary that defines the crime, not the legislative authority. I submit that it is plain that if you leave it open to the court to say what is or is not a fraud, there it is no defined crime by this section, 5440. The same thing might be a crime or not a crime, according to the varying views of different judges. It might be a fraud in the estimation of Your Honor; it might not be so regarded by some other judge less than one hundred miles away; and therefore in the one case a conspiracy to commit an act would be held to be a crime, and in the other wholly inoffensive. That would simply be judicial legislation, and would be a violation of the long-settled principle that crimes must be defined by statute. When thus defined the citizen is protected. When not thus defined, but left open to judicial determination, the law becomes a delusion and a snare. I say, therefore, that the true interpretation of this statute is that the fraud spoken of is something that has been defined as a criminal fraud by act of Congress; and there is no such statute in existence. In Wharton's Cr. L., 8th Ed., Sec. 1356, I find the following, for which I am indebted to my associate, Mr. Chandler:

By the thirtieth section of the act of Congress of February 3, 1867, where there is a conspiracy to commit any offense against the Government of the United States, or to defraud the United States in any manner whatever, and one or more of the parties to said conspiracy shall do any act to effect the object thereof, the parties to said conspiracy shall be deemed guilty of a misdemeanor, &c. And any district in which a part of the offense is committed has jurisdiction. As it is settled that the United States courts have no common law jurisdiction, this statute must be limited to conspiracies to do acts forbidden by statutes. Hence a *conspiracy to defraud cannot be prosecuted under the statute unless the fraud be one for which a person could be singly indicted*, nor can a seditious conspiracy be sustained for an offense which, if consummated by an individual unaided would not amount to sedition.

That is absolutely conclusive of the proposition I am presenting.

As to the sufficiency of the information, I will ask the court to read the case of The People vs. Barkalow, 37 Mich., 455, and I will not now take up the time of the court in reading it. I therefore now invite your attention to the averments of this information. In the first count, omitting all unnecessary verbiage,

IT CHARGES THAT

on the 1st of October, 1878, the accused combined and confederated together to defraud the United States out of large sums of money by unlawfully, fraudulently, and corruptly, and from wicked and corrupt motives, and through wicked and corrupt influences and means, causing and procuring unnecessary, and improper, and extravagant, and unlawful additional compensation for additional service on the mail route in question, and by unlawfully, wickedly, and corruptly, and from corrupt and improper motives, and through corrupt and improper influences and means, causing and procuring expedition in carrying the mail on said route to be increased without good cause and extravagantly and unreasonably, and additional compensation to an unlawful amount to be allowed in greater proportion than was allowed by law.

STRIPPING THIS STILL FURTHER

of its verbiage and stating it in its very essence, it is this: That these parties conspired to defraud the United States by causing unlawful compensation to be paid for additional service, and by causing and procuring expedition in carrying the mail, and additional compensation to be paid in greater proportion than the law allowed. The means averred of defrauding are the expedition and the increase of service. Now, the simple question is, has the unlawful or the corrupt expedition of service, or the corrupt and unlawful increase of service, or the corrupt and unlawful allowance of a greater proportion than the law allowed, been made an offense under the laws of the United States? Has any statute defined this as a crime, or have all of these put together been made an offense against the United States by any statute, or have they all, or either of them, been declared by any statute to constitute a criminal fraud against the United States? There is no such statute.

I CHALLENGE THE PRODUCTION

of any such legislation, and there being none, it is absolutely conclusive of this case. There can be no prosecution for such a charge; or if these parties were compelled to go to trial on this information, it is absolutely sure that a conviction under the law is an impossibility. The second count of this information is most manifestly utterly worthless. It charges that the defendants, on the 15th of October, 1877, conspired, combined, and confederated together unlawfully to defraud the United States of America out of large sums of money, viz.: $350,000, in connection with the carrying of the United States mail and the compensation therefor, without stating or attempting to state directly or indirectly any of the means by which this fraud was to be perpetrated, and without stating directly or indirectly

IN WHAT THE FRAUD CONSISTED,

and without stating anything to enable the court to determine whether what was proposed to be done would amount to a fraud upon the United States. This is the old English form of a charge of conspiracy—a mode of charging a conspiracy that was condemned by the English courts, although not exactly overruled, but which has been most emphatically condemned by the courts of this country, and especially by the Supreme Court of the United States in the Cruikshank case (3d U. S.), and also by Judge Dillon in the Walsh case, in 5th Dillon, 58.

In the case of the United States vs. Cruikshank et al., 2 Otto, page 547, the statute provides:

That if two or more persons band or conspire together, or go in disguise upon the public highway or upon the premises of another with intent to violate any provisions of this act, or to injure, oppress, threaten, or intimidate any citizen with intent to prevent or hinder his free exercise and enjoyment of any right or privilege granted or secured to him by the Constitution or laws of the United States, or because of his having exercised the same, such persons shall be held guilty of felony, and, on conviction thereof, shall be fined or imprisoned, or both, at the discretion of the court.

THE GENERAL CHARGE

in the first eight counts is that of "banding," and in the second eight that of "conspiring" together to injure, oppress, threaten, and intimidate Levi Nelson and Alexander Tillman, citizens of the United States, of African descent and persons of color, with intent thereby to hinder and prevent them in their free exercise and enjoyment of rights and privileges "granted and secured" to them "in common with all other good citizens of the United States by the Constitution and laws of the United States." The offenses provided for by the statute in question do not consist in the mere "banding" or "conspiring" of two or more persons together, but in their banding or conspiring with the intent or for any of the purposes specified. To bring this case under the operation of the statute, therefore, it must appear that the right the enjoyment of which the conspirators intended to hinder or prevent was one granted or secured by the Constitution or laws of the United States. If it does not so appear, the criminal matter charged has not been made indictable by any act of Congress.

IT IS A CRIME

to steal goods and chattels: but an indictment would be bad that did not specify, with some degree of certainty, the articles stolen. This, because the accused must be advised of the essential particulars of the charge against him, and the court must be able to decide whether the property taken was such as was the subject of larceny. So, too, it is in some States a crime for two or more persons to conspire to cheat and defraud another out of his property, but it has been held that an indictment for such an offense must contain allegations setting forth the means proposed to be used to accomplish the purpose. This, because to make such a purpose criminal the conspiracy must be to cheat and defraud in a mode made criminal by statute; and as all cheating and defrauding has not been made criminal, it is necessary for the indictment to state the means proposed in order that the court may see that they are in fact illegal.

In United States vs. Walsh, 5 Dillon, page 60, the court say:

We have examined all the cases cited in the arguments of the respective counsel and many others, and we have considered the propositions they have advanced, and now proceed to announce, without much elaboration, the conclusions we have reached: At common law the offense of conspiracy was complete whenever the unlawful concert and agreement was entered into and concluded, although nothing was done in pursuance thereto or to carry it into effect. The gist of the offense was the unlawful agreement. The offense of conspiracy at common law being complete without an overt act, it was one of the few cases in which the law undertook to punish criminally an unexecuted intent or purpose to commit a crime. But such is the settled doctrine of the common law, and, hence, in an indictment for conspiracy at common law, it is not necessary to allege any overt act, or to prove it if it is alleged.

IT IS A SETTLED DOCTRINE

in our jurisprudence that there are no common law offenses against the Government of the United States. An act or an omission to be criminally punished in the Federal courts must be declared to be an offense by an act of Congress. It follows that the act of Congress must constitute the sole basis of the offense of conspiracy, and the section (Revised Statutes, section 5440) on which this indictment is founded changes in material respects the offense of conspiracy as it existed at common law. This section not only makes the unlawful agreement to do the prohibited act essential to a completed offense, but also "that one or more of the parties to such conspiracy shall do some act to effect the object thereof." These considerations are important in determining the weight due to the English cases on the subject of the particularity and certainty necessary in indictments for conspiracy. The English courts have sustained indictments for conspiracy which were framed in the most general manner, and without alleging any overt acts. (Rex vs. Gill, 2 Barn. & Ald. 204.) This laxity and departure from principle have been regretted in the more recent cases in that country, and have been sought to be remedied by giving to the defendant, where the count is general and the charge indefinite, the right to call for a "bill of particulars." Examples of this may be found in Regina vs. Stapylton, 2 Cox Crim. Cases, 69; Rex vs. Hamilton, 7 Carr. and P. 448, and some other cases. We have no such anomalous practice in this country, and the settled doctrine of the American courts is that an indictment for conspiracy, like all other indictments, "must inform the defendant of the nature and cause of the accusation" (Const. U. S., Sixth Amendment), and must set forth the offense with clearness and certainty. "Every ingredient of which the offense is composed must be accurately and clearly alleged." (United States vs. Cook, 17 Wall., 174); and in the recent case of the United States vs. Cruikshank (2 Otto, 542, 557) these principles were applied by the Supreme Court of the United States to the case of an indictment for conspiracy. The judgment of the court in the case last cited was that the indictment was bad for vagueness and generality, and because it lacked the certainty and precision required by the established rules of criminal pleading.

The third count, if possible, is worse yet. It charges that the defendants conspired and agreed among themselves to defraud the United States by divers false pretenses, representations, subtle means and devices in connection with the carrying of the United States mail, and increasing the service and expedition thereof, and increasing the pay therefor. You will of course observe that the information proceeds upon the theory that it was lawful to increase the service and to expedite the service, so that there is not anything averred in either count of this information which would enable the court to say that what was conspired to be done was unlawful, or would constitute an offense against the United States. It is not sufficient for the pleader to say that a thing was unlawful or that the act of the party was corrupt. It is not his judgment as to what constitutes unlawfulness or corruption that is to prevail.

THE COURT MUST DETERMINE

matters of that kind and the pleader must give the court the facts so that the court may determine as to whether the thing was lawful or unlawful, corrupt or otherwise. On this subject I refer Your Honor to the case of *in re* Coleman (15 Blatch. 415). Thus you see that the principle that applies to judges of courts applies to legislators and executive officers. There is another proposition which it seems to me cannot be successfully controverted, and which is fatal to this proceeding. It is this: That in order to constitute an offense under this section 5,440, the fraud conspired to be committed must be such an one as has been defined by statute and made a crime; or, in other words, the conspiracy must be to do that which if done would be a crime defined by statute.

UPON PRINCIPLE THIS MUST BE SO.

There can be no crime unless the statute pronounces it a crime. If you say that the court may determine what is a fraud, and that if a party conspires to do an act, the court may determine that that thing is a fraud, it is the judiciary that defines the crime and not the legislative authority. I submit that it is plain that if you leave it open to the courts to say what is or is not a fraud, there is no defined crime by this section 5440. The same thing might be a crime or not a crime, according to the varying views of different judges. I invite Your Honor to carefully scrutinize these counts, and you will find that in not one of them is there a charge of any offense that has been denounced by statute.

I NOW CHALLENGE COUNSEL

on the other side to point me to a single case where a prosecution has been had under this statute, except for a conspiracy to commit a crime defined by statute. No such case can be found. I now come to the last of the reasons I shall offer why this information shall not be permitted. The Constitution provides that no person shall be held to answer for a capital or otherwise infamous crime unless on presentment or indictment of a grand jury. Is the accusation here made an infamous crime? That is the question. It seems to be settled by the common law that it is the crime and not the punishment that renders the party infamous. Those offenses by which a party lost the freedom of the law, *amittere liberam legem*, were infamous. This court held in general term, in the case of Cross, that there were two modes of expressing infamy. One by statute—another an inheritance from the civil law, *crimen falsi*. As to the former the court said that if the penalty *degrades the offender from his civil rights as a citizen*, the right of franchise, the right of giving testimony or *some other civil or political right*, existing in the privileges of citizenship, *it is infamous*.

I TAKE IT THAT ANY OFFENSE,

the judgment for which singles a man out and says to him, because of having committed it, you shall not exercise rights that are common to the citizen, fixes a stigma upon him—brands him—must be considered infamous. By the common law conspirators received the *villainous judgment* whereby they were *disabled as jurors or witnesses* (2 Burrell's Law Dic., 1042). Blackstone says, (4 Black., p. 136):

Conspirators may be indicted at the suit of the king, and were by the ancient law to receive the villainous judgment, namely; to lose their *liberam legem*, whereby they are discredited and disabled as *jurors or witnesses*; to forfeit their goods and chattels and lands for life; to have those lands wasted, their houses razed, their trees rooted up, and their own bodies committed to prison; but it now is the better opinion that the villainous judgment is by long disuse become obsolete, it having not been pronounced for some ages; but instead thereof the delinquents are usually sentenced to imprisonment, fine, and *pillory*. To this head may be referred the offense of sending letters threatening to accuse any person of a crime punishable with death, transportation, *pillory*, or other *infamous* punishment, &c.

Chitty, 1 c. L. 798, says that the *pillory* was considered the most disgraceful of all punishments. You will remember that it was inflicted by putting the offender's head and hands through holes made for the purpose and thus exhibiting him at the market place. In the Commonwealth vs. 3 Watts and Sergt it was held that a punishment that incapacitates as a *juror or a witness is infamous*.

In 2 Hale P. C., 277, the rule is thus laid down: "If a party is attaint of conspiracy at the king's suit he is incapacitated as a witness, for then be is to have a villainous judgment and *amittere liberam legem*, otherwise if at the suit of the party. The same rule is laid down in 2 Hawk., p. 609, sec. 19. See also Peddle's case, Leach Cr. L. 282, and the Porter case, 2 Cranch C. C.

AT COMMON LAW THEN CONSPIRACIES WERE

punished with villainous judgment, and after that went into disuse with pillory. Conspirators were disqualified as witnesses. And any punishment that disqualified as a juror or witness, was infamous. I know it is not easy to determine from the books the scope of *crimen falsi* at the common law. But it is entirely safe to say that whenever an offense is of such a character that its commission deprives a man of *any right common to citizenship*,